

October 16, 2023

Chair Dara Lindenbaum
Vice Chairman Sean J. Cooksey
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: REG 2023-02, Artificial Intelligence in Campaign Ads

Dear Chair Lindenbaum and Vice Chairman Cooksey:

The Brennan Center for Justice at New York University School of Law (the “Brennan Center”)¹ respectfully submits this Comment in response to the Notice of Availability published August 16, 2023, concerning Artificial Intelligence (“AI”) in campaign ads. We urge the Commission to grant the Petition and commence a rulemaking proceeding to amend 11 C.F.R. § 110.16 and act on deliberately deceptive AI-produced content in campaign communications pursuant to its authority under the Federal Election Campaign Act (“the Act”).²

I. Increasingly sophisticated deepfakes threaten the integrity of our elections.

Since the 2020 election, disinformation using generative AI technology has emerged as a significant threat to elections around the world.³ Recent advances have made it increasingly easy to create realistic deepfake video recordings, audio clips, and images without extensive training or advanced equipment.⁴ These communications are now sufficiently sophisticated that they can

¹ The Brennan Center is a nonpartisan public policy and law institute that focuses on the fundamental issues of democracy and justice. For more than 25 years, the Brennan Center has studied, litigated, and drafted legislative solutions regarding money in politics, voting, and election administration. The views expressed in this comment do not reflect the views, if any, of the NYU School of Law.

² See 52 U.S.C. § 30124.

³ Mekela Panditharatne, *How AI Puts Elections at Risk – And the Needed Safeguards*, Brennan Center for Justice, last updated July 21, 2023, <https://www.brennancenter.org/our-work/analysis-opinion/how-ai-puts-elections-risk-and-needed-safeguards>.

⁴ *Id.*; Todd C. Helmus, *Artificial Intelligence, Deepfakes, and Disinformation*, Rand Corporation, July 2022, <https://www.rand.org/pubs/perspectives/PEA1043-1.html>. The term “deepfake” as used in this comment means “video, image, or audio recordings generated or substantially modified using machine-learning technologies in order to falsely depict events, to falsely depict the speech or conduct of an individual, or to depict individuals who do not exist.” See National Defense Authorization Act for Fiscal Year 2020, Pub.L. 116-92, § 5724(d).

easily mislead voters, and in the near future it is likely to become harder for even experts to distinguish them from authentic depictions of real events.⁵

AI-generated deepfakes are already playing a role in the 2024 campaign. For instance, the presidential campaign of Governor Ron DeSantis disseminated AI-generated images of former President Donald Trump embracing Dr. Anthony Fauci. Governor DeSantis himself has been the target of deepfakes, including fake video purporting to show him announcing that he is dropping out of the presidential race.⁶

Deepfakes are also appearing in other countries' elections. Just two days before Slovakia's recent elections, fake audio that depicted the leader of one of the country's major parties supposedly discussing plans to rig the election was disseminated on social media.⁷ Observers have suggested that this may have helped swing a tight race to the country's pro-Kremlin opposition, which advocates withdrawing military support from Ukraine.⁸ The origins of this audio—including whether it could have been part of a foreign disinformation campaign—remain unknown.⁹

As the U.S. Supreme Court observed in *Buckley v. Valeo*: “In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential....”¹⁰ AI-generated disinformation about candidates strikes at the heart of this important public interest in having an informed electorate.¹¹ It can also be used to defame and harass candidates themselves, with the negative effects likely to fall disproportionately on those who already tend to suffer the most online harassment, such as female and LGBTQ candidates, who as a consequence may be less likely to run.¹²

Finally, deepfakes impersonating candidates are likely to become an increasingly effective tool for defrauding donors. Deepfake audio and video recordings of prominent figures

⁵ See, e.g., David Klepper and Ali Swenson, *AI-generated disinformation poses threat of misleading voters in 2024 election*, PBS NewsHour, May 14, 2023, <https://www.pbs.org/newshour/politics/ai-generated-disinformation-poses-threat-of-misleading-voters-in-2024-election>; Adam Satariano and Paul Mozur, *The People Onscreen Are Fake. The Disinformation is Real.*, New York Times, February 7, 2023, <https://www.nytimes.com/2023/02/07/technology/artificial-intelligence-training-deepfake.html?partner=slack&smid=sl-share>.

⁶ Steve Contorno and Donie O'Sullivan, *DeSantis campaign posts fake images of Trump hugging Fauci in social media video*, CNN, June 8, 2023, <https://www.cnn.com/2023/06/08/politics/desantis-campaign-video-fake-ai-image/index.html>; Peter Suciui, *There Is Now A Deep Fake Video of Ron DeSantis Dropping Out of the 2024 Race*, Forbes, September 2, 2023, <https://www.forbes.com/sites/petersuciui/2023/09/02/there-is-now-a-deep-fake-video-of-ron-desantis-dropping-out-of-the-2024-race/?sh=1d57c45d7bf9>.

⁷ Mogan Meaker, *Slovakia's Election Deepfakes Show AI Is a Danger to Democracy*, Wired, October 3, 2023, <https://www.wired.co.uk/article/slovakia-election-deepfakes>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Buckley v. Valeo*, 424 U.S. 1, 15–16 (1976).

¹¹ *Id.*

¹² See Cécile Guerin and Eisha Maharasingam-Shah, *Public Figures, Public Rage: Candidate abuse on social media*, Institute for Strategic Dialogue, October 5, 2020, <https://www.isdglobal.org/isd-publications/public-figures-public-rage-candidate-abuse-on-social-media/>.

are already common in other types of scams.¹³ With scam PACs falsely claiming to raise money on behalf of candidates already proliferating,¹⁴ it likely is only a matter of time before these entities start to use deepfakes to deceive their targets.

For all of these reasons, prompt action by the Commission is warranted.

II. The Commission has the statutory authority to act on deliberately deceptive AI-produced content.

The Federal Election Campaign Act (“FECA”) prohibits federal candidates and their agents from fraudulently misrepresenting themselves to be “speaking or writing or otherwise acting” on behalf of another candidate or political party “on a matter which is damaging” to the one being misrepresented, or from participating in a conspiracy to do so.¹⁵ The Commission has explained that the Act “encompasses, for example, a candidate who distributes letters containing statements damaging to an opponent and who fraudulently attributes them to the opponent.”¹⁶ Dissemination of a deepfake impersonating another candidate or political party representative’s voice or image—in a manner that is damaging to the candidate or party and such that a reasonable person would believe it depicts actual speech or conduct—is clearly analogous to the example the Commission provided. The Commission should make clear that that such conduct is also prohibited.

The Act also prohibits any “person” from “fraudulently misrepresent[ing]” that they are “speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations.”¹⁷ Here too, it is important for the Commission to make clear that any use of a deepfake to deceptively impersonate a candidate or representative of a political party in a fundraising appeal is prohibited.

We acknowledge that the Commission’s authority under the Act is limited, and that any sort of comprehensive regulation of the use of deepfakes and other deceptive AI technology in campaign ads would likely require action by Congress. Action here, however, would address an important facet of the problem, providing much-needed guidance ahead of the 2024 election. We urge you to take this opportunity.

¹³ Kevin Collier, *Deepfake scams have arrived: Fake videos spread on Facebook, TikTok and YouTube*, NBC News, August 29, 2023, <https://www.nbcnews.com/tech/tech-news/deepfake-scams-arrived-fake-videos-spread-facebook-tiktok-youtube-rcna101415>.

¹⁴ Shane Goldmacher, *Three Men Charged With Running ‘Scam PACs’ That Bilked Small Donors*, New York Times, November 10, 2021, <https://www.nytimes.com/2021/11/10/us/politics/pac-operator-charges.html>.

¹⁵ 52 U.S.C. § 30124(a).

¹⁶ 67 Fed. Reg. 76,968 (Dec. 13, 2002).

¹⁷ 52 U.S.C. § 30124(b).

Respectfully submitted,

/s/

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